UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 24 1996

Honorable Lois D. Cashell
Secretary
Federal Energy Regulatory Commission
825 North Capitol Street, N.E.
Washington, DC 20426

Re: Virginia Electric and Power Co., "Order Approving Non-Project Use of Project Lands and Waters and Amending License," Project No. 2009-003, 72 F.E.R.C. ¶ 61,075 (July 26, 1995), reh'g denied, 72 F.E.R.C. ¶ 61,283 (Sept. 22, 1995), on appeal, State of North Carolina v. FERC, No. 95-1494 (D.C. Cir.).

Dear Ms. Cashell:

On September 11, 1996, the United States Court of Appeals for the District of Columbia Circuit remanded the above-captioned order to the Commission to determine whether the order requires a certification from the State of North Carolina pursuant to Section 401(a)(1) of the Clean Water Act ("CWA"), 33 U.S.C. § 1341(a)(1). The court's question, which requires an analysis of the term "discharge" as it appears in Section 401, goes directly to the jurisdictional reach of Section 401, a provision of the CWA which the U.S. Environmental Protection Agency believes is of vital importance to the nation's program to protect water quality.

We are therefore writing to express the views of EPA on this important question. For the reasons set out below, it is EPA's position that the license amended in this proceeding results in a discharge to North Carolina waters and thus

triggers the requirement of a Section 401 certification from that State. We request that you provide this letter to the Commission for its consideration as it responds to the court's order.

Background

Relevant Statutory Provisions

Section 401(a)(1) of the CWA provides that

> [A]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate ... that any such discharge will comply with [the effluent limitations and water quality requirements of the CWA].

33 U.S.C. § 1341(a) (1) (emphasis added).

Under Section 401(a)(2) of the CWA, the agency issuing a federal license must "immediately notify" EPA of its receipt of a license application and Section 401 certification. If EPA determines that the discharge may affect the water quality of another State, it must notify the federal agency, the affected State, and the applicant. If the affected State determines that the proposed discharge will violate its water quality requirements, it may object to the issuance of the permit and request a hearing to determine the appropriate conditions to be placed in the license to resolve the concerns of the affected State.

A 1978 EPA General Counsel opinion and relevant case law make clear that only the State where the "discharge" occurs -- not the State where the facility is located (if different), and not any other States where there are water

quality impacts -- has the authority to certify under Section 401(a)(1). EPA General Counsel Opinion 78-8; NWF v. FERC, 912 F.2d 1471, 1483 (D.C. Cir. 1991); but cf. Lake Erie Alliance for the Protection of the Coastal Corridor v. U.S. Army Corps of Engineers, 526 F.Supp. 1063, 1075 (W.D. Pa. 1981), aff'd mem., 707 F.2d 1392 (3d. Cir.), cert. denied, 464 U.S. 915 (1983) (misreading EPA's 1978 opinion to mandate certification from the State where the facility is located). States whose water quality may be affected by a discharge must rely on Section 401(a) (2).

Facts of This Case

On July 26, 1995, the Commission issued an order approving the application of the Virginia Electric and Power Company ("VEPCO") for a non-project use of the lands and waters associated with the Gaston and Roanoke Rapids Project (No. 2009), and amending the project license to accomodate that use. Among other things, the order approved the withdrawal of up to 60 million gallons per day of water from the Lake Gaston reservoir and a modified operation of the Roanoke Rapids dam to reflect that withdrawal, subject to several conditions that were added to the license. The water in the Lake Gaston Reservoir ultimately flows through the Roanoke Rapids dam, which is in North Carolina.

The Commission, in its decision, rejected the argument raised by North Carolina that the license amendment was invalid because North Carolina had failed to certify the amendment under Section 401. The Commission stated that, "even assuming, arguendo, that the proposed amendment to the Project No. 2009 license ... is subject to the provisions of section 401(a)(1)," the amendment would have "no material adverse impact" on North Carolina water quality, and thus certification was not needed under Commission regulations. 72 F.E.R.C. at 61,393-94 (citing 18 C.F.R. § 4.38 (f)(7)(iii)).

The State of North Carolina and the Roanoke River Basin Association petitioned the United States Court of Appeals for the D.C. Circuit to review the Commission's order amending the project license. After briefing and oral argument, the court issued a brief order explaining that

> [the] language [of the Commission's order] leaves unresolved the question of whether § 401(a)(1) applies to require a certification from North Carolina, insofar as the Commission 'assum[ed], arguendo' that the answer was 'yes' and proceeded to rest its action on ... its regulations. ... [T]he Court believes that in the interest of judicial economy the Commission should answer this question before we ... review ... the other issues of the case.

State of North Carolina v. FERC, No. 95-1494 (D.C. Cir. Sept 11, 1996), Order at 2.

Interests of the Environmental Protection Agency

The Supreme Court has described the Clean Water Act as a "comprehensive water quality statute designed to restore the chemical, physical and biological integrity of the Nation's waters." PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology, __ U.S. __, 114 S.Ct. 1900, 1905 (1994) ("PUD") (quoting CWA Section 101(a), 33 U.S.C. § 1251(a)). And, in the process of achieving this ambitious goal, "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). Section 401 is one of the most critical authorities States have under the CWA to ensure the protection of water quality and the elimination of water pollution. See, e.g., United States v. Puerto Rico, 721 F.2d 832, 838 (1st Cir. 1983); Mobil Oil Corp. v. Kelley, 426 F.Supp. 230, 234-35 (S.D. Ala. 1976).

EPA maintains a strong interest in ensuring the rights of States under the CWA to protect and maintain their water quality. As the Agency charged with administration of the Clean Water Act, EPA's views as to the scope of Section 401 are clearly entitled to deference. PUD, 114 S.Ct. at 1909; see also, Arkansas v. Oklahoma, 503 U.S. 91, 107 (1992).

Analysis

Does the License Amendment Trigger an Obligation to Obtain CWA Section 401 Certification from North Carolina?

Given the explicit language of Section 401(a)(1), it is unquestionable that the Commission's license for the Lake Gaston project results in a discharge originating in North Carolina. To repeat that language, "any applicant for a Federal license or permit to conduct any activity ... which may result in a discharge" shall obtain a Section 401 certification from the State "in which the discharge originates" (emphasis added). VEPCO's license for Project No. 2009 authorizes it to "conduct the activity" of operating the Roanoke Rapids dam to generate electric power. That activity "may result," and indeed, does result, in a "discharge" of water over and through the dam. See PUD, 114 S.Ct. at 1908 (discharge of water from the tailrace of a hydroelectric project is within the scope of Section 401). Thus, the license, and amendments thereto, trigger the requirement of a Section 401 certification from North Carolina.

Although the Commission expressly declined to rule on the issue, some parties have argued that the license amendment would result in no discharge in North Carolina's waters because the "activity" being conducted pursuant to the license amendment is the withdrawal of water from Lake Gaston. Since a withdrawal of water is not a "discharge" within the meaning of Section 401, PUD, 114 S.Ct. at 1908, it

has been asserted that the license amendment will not result in a discharge in North Carolina.

This argument misunderstands the Supreme Court's decision in PUD. In PUD, the water returned to the stream after use for power generation was a "discharge" of water that triggered Section 401(a)(1). The Court correctly noted that the alleged water quality problem (reduction in flow prior to the return point) was not a result of the discharge of water at the return point, but of the withdrawal of water upstream. Id. at 1908-09. Nonetheless, the release of water from the tailrace of the hydroelectric facility was a "discharge" which triggered Section 401(a)(1). The operation of the facility was the "activity" being licensed by the Commission for which Section 401 certification was required in PUD. Similarly, in this case, although the amendment of VEPCO's license addresses the proposed withdrawal of water, the Commission's license being amended authorizes the "activity" of operating the hydroelectric facility which discharges into North Carolina waters.

EPA also disagrees with the argument that North Carolina would not be able to use its certification authority to address alleged water quality problems associated with the withdrawal of water from Lake Gaston. In PUD, the Supreme Court held that once a federal license triggers a Section 401 certification obligation due to the existence of a discharge, the certifying State may address any aspect of the licensed activity which may affect State water quality standards, including reductions in stream flow associated with the project. 114 S.Ct. at 1909. The license amendment will result in reductions in stream flow from the dam in North Carolina. In light of PUD, the reductions in stream flow could be scrutinized by North Carolina as part of a Section 401 review to assure compliance with its water quality standards.

Finally, EPA disagrees with the contention that Section 401 certification is not required because, it is alleged, there will be no change to the "activity" of operating the hydroelectric project due to the amendment of the license. First of all, it is clear that the license amendment alters the terms of operation of the dam in North Carolina -- the activity that results in a discharge. As the Commission noted, the project use which mandated the license amendment will cause a reduction in flow from the Roanoke Rapids dam, 71 F.E.R.C. at 61,394. Indeed, the Commission amended the license to add a provision to ensure the mitigation of downstream impacts or fishery resources due to the proposed withdrawal.

In any event, EPA wishes to emphasize that even if there were no change to the licensed activity, Section 401 would be triggered by issuance of a license. Section 401 certification is required whenever a federal license is issued that applies to any activity, including an ongoing activity, which "may result" in a discharge. Furthermore, EPA, U.S. Army Corps of Engineers, and Commission regulations all require Section 401 certifications for licensing of ongoing activities and discharges and amendments to such licenses. 18 C.F.R. § 4.38(f)(7); 33 C.F.R. § 325.2(b)(1); 40 C.F.R. §§ 122.62, 124.53, 124.55(e). Under the explicit language of Section 401(a)(1) , it does not matter that the activity, or the discharge from that activity, was occurring prior to issuance of the federal license, since "any applicant" for a federal license "which may result in a discharge" must obtain a Section 401 certification.[1]

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[1]. In its decision, the Commission, "assuming" the existence of a discharge, ruled that North Carolina was nonetheless barred from certifying under Section 401 in light of the Commission's regulation governing certification requirements in license amendment proceedings,

(Footnote continued)

In EPA's view, the amendment of the license to operate the Lake Gaston hydroelectric project results in a discharge to North Carolina waters within the meaning of Section 401 of the CWA.

Thank you for your consideration of the views expressed in this letter.

Sincerely yours,

s/ Jonathan Z. Cannon

Jonathan Z. Cannon
General Counsel

s/ Bob Perciasepe

Robert Perciasepe
Assistant Administrator for Water

cc: Carol M. Browner
Lois Schiffer
Parties to Proceeding

(Footnote continued)

18 C.F.R. § 4.38(f)(7)(iii). EPA expresses no position here on this aspect of the Commission's decision, nor does EPA intend to express views on the impacts of the amended license on North Carolina water quality beyond those already in the record.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 16 1997

OFFICE OF
GENERAL COUNSEL

To: Parties on Service List

Re: State of North Carolina v. FERC, No. 95-1494 (D.C. Cir.) (and consolidated case)

Dear Sir or Madame:

I am enclosing for your information a letter from EPA to the Attorney General of Virginia explaining the Agency's position regarding the application of Section 401 of the Clean Water Act to license amendments, as set forth in the amicus brief recently filed by the United States in this proceeding.

Sincerely,

s/Jonathan Z. Cannon

Jonathan Z. Cannon
General Counsel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 16 1997

OFFICE OF
GENERAL COUNSEL

The Honorable James S. Gilmore, III
Attorney General
Commonwealth of Virginia
900 East Main Street
Richmond, Virginia 23219

Re: State of North Carolina v. Federal Energy Regulatory Commission, No. 95-1494 (D.C. Cir.) (and consolidated case)

Dear General Gilmore:

We are writing in reference to your letters of January 3, 1997 to the Attorneys General of the States who joined in an amicus curiae brief in the above-captioned case, which involves the rights of States under Section 401 of the Clean Water Act, 33 U.S.C. § 1341. With all due respect, we do not believe your letters fairly represent the views of EPA set forth in the amicus brief filed by the United States in this case. Although the letters were not addressed to EPA, they seek to characterize EPA's position in this important matter in a way which may engender confusion, and therefore require a response.

EPA views Section 401 of the Clean Water Act as a provision of vital importance to the nation's program to protect

water quality. Section 401 is one of the most important authorities afforded States under the Act to ensure the protection of water quality and the elimination of water pollution within their boundaries. EPA has consistently sought to preserve and strengthen the rights of States to protect and maintain their water quality under the provisions of the Clean Water Act, particularly Section 401.

The key issue in this litigation, as you know, concerns the rights of States to provide certification under Section 401 in the context of amendments to federal licenses or permits. The application of State certification authority to amended licenses or permits is not explicitly addressed by the language of Section 401. EPA believes, however, that preserving the States' authority to certify to an amended license or permit is critical to full implementation of the goals and purposes of Section 401 and the Clean Water Act. It was for this reason that the agency, through the United States Department of Justice, presented its views to the court.

As the brief of the United States makes clear, where a license amendment adversely affects water quality due to changes in the original discharge -- that is, the discharge or discharges that result or may result from the activity subject to a federal license or permit as a whole -- certification by the State where the original discharge occurs is required. Brief of United States at 8. This interpretation is essential to ensure that amendments to federal licenses or permits are not used as a mechanism to avoid State certification of changes to federally-licensed activities which may adversely affect water quality. A contrary view, precluding States from reviewing the impacts of license amendments on their water quality except where the amendment itself caused a new discharge, would undermine the authority of the States to protect their water quality, and would invite abuse. The United States' brief squarely rejects such a view, and it is our understanding that

FERC's brief agrees with the position taken by the United States on this critical point.

Although in our view this is the central issue in this litigation that may affect States' rights under Section 401, your letter does not refer to it. Instead, your letter asserts that the United States' amicus brief supports FERC in this litigation, rejects the position taken by EPA in the letter it filed with FERC regarding these issues on October 24, 1996, and demonstrates that North Carolina's position in this case is "both unsupportable and now unsupported by any federal agency." We believe that these characterizations of the United States' brief are inaccurate and unfair.

First, the United States' brief was not intended to, and does not, take a position regarding who should prevail in this litigation. On the central issue, the brief explicitly states that "North Carolina's 401(a)(1) rights turn on whether the amendment adversely affects the original discharge in North Carolina." United States' brief at 10. The United States and EPA do not, however, take any position on that factual issue, nor on the validity of FERC's regulation governing license amendments. See United States' brief at 4 n.1. (EPA expresses no position here on FERC's factual conclusions."); 9 n.6 ("EPA expresses no view on the validity of FERC's specific regulation, other than to say that FERC has properly concluded that where a license is amended the question of adverse impact on the original discharge must be examined."). The United States' brief concludes: "If the court sustains FERC on this issue, it may conclude that further certification from North Carolina is not necessary in order for the license amendment to be lawfully issued." United States' brief at 10. It follows equally, however, that if the court does not sustain FERC with respect to the validity of its regulation or its conclusions regarding the effect of the license amendment, further certification may be required.

Second, the United States' brief does not "reject" EPA's October 24 letter. Rather, the brief rejects FERC's sweeping characterization of that letter as mandating that '"any amendment to a license triggers a requirement for CWA Section 401(a)(1) certification even absent any nexus at all between the amendment and water quality."' United States' brief at 4 n.1, quoting from FERC Order on Remand, p. 16 (emphasis in original). As the United States' brief indicates, this is not EPA's view; the statements in EPA's letter which were misconstrued by FERC addressed the issuance of a license, not amendments to licenses, and were intended to rebut the claim, made by others, that 401 certification did not apply to relicensing of ongoing activities. See Letter from Jonathan Z. Cannon and Robert Perciasepe to Lois D. Cashell (October 24, 1996), at 5. With respect to amendments to licenses, EPA's view is that set forth in the United States' brief: a State's right to certify amendments depends upon whether changes to the original discharge under the license may have an adverse impact upon water quality within the State. Apart from that clarification, the United States' brief does not change the basic premise of EPA's October 24 letter that Section 401 is implicated by amendments to licenses.

We hope that this letter is helpful to you in understanding EPA's views on this important matter. We look forward to continuing to work closely with you and with the responsible officials of the other States to ensure that Section 401 affords the States an effective mechanism to protect the quality of their waters.

Sincerely yours,

s/Jonathan Z. Cannon

Jonathan Z. Cannon
General Counsel

s/Bob Perciasepe

Robert Perciasepe
Assistant Administrator for
Water

cc: Amici Attorneys General